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IN THE

Supreme Court of the United States

DAVID R. JANSEN, WILLIAM J. LORENCE, and N. PETER KNOLL,

Petitioners,

v.

US BANK NATIONAL ASSOCIATION, ND, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents do not seriously dispute that six circuits require a non-boilerplate explanation of the reasons for approving a class action settlement and attorneys' fees, whereas the Eighth and First Circuits require no such explanation by a district court. Nor do respondents offer any defense of the Eighth Circuit's rule approving such silent supposed exercises of discretion by district courts. Instead they pretend that the settlement terms and fees in this case were defensible and continue, like the courts below, to remain silent to the objections raised by petitioners. The obligation to provide a cogent explanation for the approval of class action settlements and fee awards, however, lies first and foremost with the district court, and this Court should grant certiorari to establish that obligation uniformly across the circuits.

STATEMENT OF THE CASE

Without conceding the many other dubious and unsupported factual claims offered by respondents, only one flagrant misstatement implicates the issue of whether to grant certiorari. Respondents falsely assert that petitioners before the Eighth Circuit "did not positively contest or argue that the settlement was in any way inadequate or unfair." BIO 6. But even a cursory review of the briefs below shows that petitioners most certainly *did* challenge the fairness and adequacy of the settlement and fee award. *See, e.g.*, Appellants' Brief, *In re U.S. Bancorp Litig.*, Nos. 01-1217 & 01-1242 (CA8, Apr. 19, 2001), at 40 (noting that "there is nothing in the record to support the reasonableness of the settlement amount" and arguing that the amount constitutes little more than a nuisance recovery rather than any consideration for the claims themselves); *id.* at 41-42 (noting that "there is nothing in the record to support the disparate treatment of checking and credit card customers" and arguing that such treatment is a sign of unfairness); *id.* at 45-47 (objecting to lack of scrutiny of attorneys' fees and noting zero-sum nature of case whereby such fees reduce recovery to class; noting court's apparent application of a 25% fee percentage, but incorrect application of that percentage to $5 million rather than correct amount of $3.5 million); *id.* at 50-55 (arguing that even 25% award was excessive given rapid settlement of the case and other factors); *id.* at 60-61 (objecting to disproportionate payments to class representatives where there was no evidence that representatives undertook any additional effort whatsoever and never had to go through discovery). Petitioners, of course, also squarely raised their claim that the district court was required to provide reasoned explanations for its approval of the settlement and fee award. *Id.* at 34-40, 44.

Because petitioners raised both their substantive objections to the settlement, and their procedural objection to the district court's refusal to explain its dubious decisions, the question in this petition is properly presented for review.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM NUMEROUS OTHER CIRCUITS.

Respondents offer no coherent challenge to the existence of a combined 6-2 conflict on the issues presented by this case. The Eighth Circuit's rule *assuming*, even absent any reasoning from a district court, the proper exercise of discretion in a class settlement approval is in conflict with the rule in three and six other circuits, respectively, requiring express reasoning from a district court regarding approvals of settlements and attorneys' fees. Pet. 7-11.[1]

Instead respondents merely assert, without explanation, that there "is no conflict in the courts," and claim, without case citation, that "the Eighth Circuit does require that the district court have shown it made a reasoned judgment about the settlement after hearing opposing views." BIO 7, 8. Of course, the Eighth Circuit disagrees with respondents' claim and expressly *refuses* to require a district court to articulate its reasons, if any, for reaching a decision on a class action settlement. Pet. 9-10 (discussing cases establishing the Eighth Circuit rule). The most the Eighth Circuit requires seems to be a hearing whereby the court goes through the motions of feigning attention to any objections, but given that district courts are not required to address such objections with anything beyond a boilerplate rejection of the lot of them, a hearing alone is hardly a sufficient incentive for judicial diligence. While "hearing opposing views" is certainly a useful start for the judicial function, in the Eighth Circuit it also seems to be the end of the function, and there is no requirement that the

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[1] *Cf. Weinberger* v. *Kendrick*, 698 F.2d 61, 82 (CA2 1982) ("we reaffirm the duty of district judges in this circuit to make a considered and detailed assessment of the reasonableness of proposed settlements of class actions, as held by the [Third and Seventh Circuits]"), *cert. denied*, 464 U.S. 818 (1983).

court engage in reasoned decision making regarding such opposing views when it chooses to approve a settlement. [2]

Only the First Circuit has sided with the Eighth Circuit in adopting a rule that either ignores the complete lack of analysis by a district court or substitutes the circuit court's discretion where the district court shows no evidence of having exercised its own. Pet. 10. Because other circuits rightly demand more in the settlement approval context, and because the minority views of the First and Eighth Circuits appear well-entrenched, only a decision of this Court will uproot the error established in those circuits.

II. THE FAILURE TO REQUIRE DISTRICT COURTS TO ARTICULATE THEIR REASONING CONFLICTS WITH DECISIONS OF THIS COURT AND MAKES REVIEW FOR ABUSE OF DISCRETION IMPOSSIBLE.

The need for this Court's review is accentuated by the absurdity of a rule that enables and encourages an absence of reasoning by the lower courts in precisely those circumstances where *extra* vigilance is required. As this and many other courts have often recognized, class action settlements are fraught with the potential for abuse because the adversarial process breaks down in the settlement and approval process and unnamed class members can be sacrificed to the interests of the negotiating parties and their attorneys. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997) (noting, with regard to class certification requirements, the need for

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[2] Respondents' irrelevant observation regarding the need to prevent settlement hearings from becoming full trials on the merits, BIO 7, has nothing to do with the split among the circuits regarding the need for a district court to memorialize a bare modicum of coherent reasoning. Furthermore, none of the majority circuits requires a full-blown trial at the settlement hearing, nor is that what petitioners seek. Rather, petitioners and six other circuits simply expect a district court to provide an adequate basis for review and to provide some evidence that it has actually exercised its discretion rather than abdicated to settling counsel.

"undiluted, even heightened, attention in the settlement context" to provisions designed to protect absent class members); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 730 (CA3) ("the danger inherent in the relationship among the class, class counsel, and defendants 'generates an especially acute need for close judicial scrutiny of fee arrangements' in class action settlements") (citation omitted), *cert. denied*, 120 S. Ct. 202 (2001); *Malchman* v. *Davis*, 706 F.2d 426, 432 (CA2 1983) (court must be doubly careful in scrutinizing a settlement where class is certified purely for settlement purposes).

Respondents do not attempt to defend the source of the Eighth Circuit's error – the unfortunate *dicta* from *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson,* 390 U.S. 414, 437 (1968). *See* Pet. 11-13. Instead, they quote the discussion from *Protective Committee* eschewing "mere boilerplate," BIO 7, oblivious to the fact that such language is precisely in conflict with the Eighth Circuit's acceptance of the district court's boilerplate in this case.[3] And respondents offer no defense of the conflict between the decision below with regard to attorneys' fees and this Court's decision in *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983), and Federal Rule of Civil Procedure 54(d)(2). Pet. 13-14.

Given the nature of discretionary decisions, the only genuine safeguard against abuse is the procedural requirement of an explanation by the district court demonstrating whether and how it exercised its discretion. Without some articulated reasoning beyond mere boilerplate, it is virtually impossible to exercise appellate review for abuse of discretion.

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[3] Respondents' subsequent attempt to distinguish *Protective Committee* on the ground that a hearing was held in this case, BIO 7-8, is hardly relevant to this Court's expectation of the reasoned decision making and explanation that must *follow* such a hearing. As for any indicia of such post-hearing reasoning, the material discussion in this case is just as cursory – a bare four sentences of boilerplate – and the record just as bereft of explanation or support as it was in *Protective Committee*.

Even now, for example, respondents offer precious little that would give an appellate court confidence in either the reasoning or the results below. Rather than address the objections made by petitioners, respondents instead disparage the very class claims that they themselves filed, BIO 2-3, seemingly in defense of the low overall settlement total of $3.5 million for the 6 million persons receiving the class notice. But neither the opinions below nor the record in general offer much support for class counsel's dim views and sudden change of heart regarding the merits of their complaints.[4] Even assuming less than overwhelming merit to the class complaint, respondents point to nothing at all that would permit cogent review of the many additional factors that a district court must consider in evaluating a settlement. Pet. 12. And, of course, there is absolutely nothing in the opinions, the record, or the Brief in Opposition, that justifies the settlement's discriminatory treatment of credit card customers relative to checking account customers or the disproportionate recoveries given to class representatives who seem to have done nothing at all given how quickly the case was settled. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 808 (CA3) ("One sign that a settlement may not be fair is that some segments of the class are treated differently from others."), *cert. denied*, 516 U.S. 824 (1995).[5]

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[4] Respondents' reference, BIO 2, to a single adverse ruling from a North Dakota state trial court is hardly sufficient grounds for class counsel to be allowed to cut and run without some explanation by the district court itself regarding its views on the merits of that non-authoritative decision and on the merits of the case in relation to the settlement.

[5] Respondents illogically attempt to imply that the settlement was somehow fair because only slightly more that 1% of notice recipients submitted claims (81,695 out of 6 million), and only slightly less than 1% of claimants submitted objections (70 out of 81,695). BIO 4. But nothing in the record or the Brief in Opposition identifies whether the roughly 1% claims and objection rates are high or low relative to other class action settlements, and they studiously ignore the more plausible inference that the

The deficiencies of allowing district courts to dispense with even the pretense of analysis is further illustrated by class counsel's current lackadaisical efforts to justify their fees with claims of having attended "numerous meetings," having performed "[s]ignificant work" on the settlement, and having to divide fees among ten sets of class counsel. BIO 3-4, 6. But nothing in the decisions or the record below suggests that the district court considered, much less accepted, class counsel's current explanations. Indeed, it is hard to tell whether the court awarded fees based on a percentage-recovery scheme (as seems likely), or based upon a lodestar analysis (using the cursory time and expense chart submitted by class counsel, Pet. App. G1-G4). *See In Re Cendant*, 243 F.3d at 733-35 (vacating fee award where district court failed to identify method used, ignored factors required for determining fees, and failed adequately to explain its reasoning). And under either method, fees likely should have been adjusted downward given respondents' concession, BIO 3, that "[b]ecause of the resolution of the Attorney General's action shortly after the litigation was commenced, there was no dispute about the Bank's actions, but only what liability could be based on those undisputed actions."

III. THIS CASE RAISES IMPORTANT NATIONAL ISSUES THAT SHOULD BE RESOLVED BY THIS COURT.

The constant potential for abuse in class action settlements, and the frequently appalling spectacle of class attorneys receiving huge windfalls while class members receive at best a pittance, make the question presented by this petition one of national importance. The right of class members to object, and the right of objectors to appeal, will be rendered largely meaningless in circuits where district courts need not, and thus often will not, address the objections, and where cir-

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low claims rate suggests the settlement was utterly worthless to 99% of those whose claims would be extinguished by the settlement.

cuit courts will affirm settlements regardless of their inability to determine whether discretion was even *exercised* by the district court, much less abused.

Such a charade at judicial decision making not only deprives objecting class members of any *meaningful* day in court, it also deprives class members and the public of any basis for confidence that justice was done, thus bringing the courts and the legal profession into disrepute. In order to promote both the actuality of reasoned decision making in the district courts, and the confidence-generating indicia of such decision making, this Court should take up the question presented in this petition and require district courts to both engage in and explain their reasoning when approving class action settlements and awards of attorneys' fees and expenses.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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